Administrative Collateral Estoppel: The Case of Subpoenas

In *Federal Trade Commission v. Texaco, Inc.*,[1] the Federal Trade Commission (FTC) sought to enforce subpoenas requiring from natural gas producers internal documents relating to gas reserve estimates. The producers resisted these subpoenas on grounds, *inter alia,* of collateral estoppel.[2] Because the accuracy of certain of the estimates had already been the subject of an administrative proceeding before another agency,[3] the Commission's subpoenas arguably sought to reopen issues already determined in a competent forum. Although the defendants' collateral estoppel defense eventually proved unsuccessful, *Federal Trade Commission v. Texaco, Inc.* raises important questions regarding the application of collateral estoppel to the subpoena stage of an administrative proceeding.[4]

The diversity of views expressed by the judges in the *Texaco* litigation illustrates the difficulties that courts have faced in analyzing the collateral estoppel defense to administrative subpoenas. The district court refused to enforce the FTC subpoenas; without relying squarely

1. 555 F.2d 862 (D.C. Cir.) (en banc), *cert. denied,* 431 U.S. 974 (1977).

2. A subpoena *duces tecum* specifying bid files and other geophysical models and projections of natural gas reserves was issued by the FTC in November 1971. The FTC investigation focused on the anticompetitive impact of the gas producers' reporting techniques. The gas producers filed motions to quash the subpoenas with the FTC. In June 1972, the Commission denied the motions. Some of the defendants agreed to comply with the subpoenas, but several gas producers negotiated with the Commission for a year over the subpoenaed material. The FTC filed a petition for enforcement of the subpoenas in United States District Court on June 4, 1973. FTC v. Texaco, Inc., 555 F.2d 862, 866-70 (D.C. Cir.) (en banc), *cert. denied,* 431 U.S. 974 (1977).

3. The defendants argued that collateral estoppel should limit the scope of the FTC's inquiry because the Federal Power Commission (FPC) had found that the gas reserve estimates were accurate for the purposes of ratemaking in the FPC investigation of reserves and rates for the Southern Louisiana Area (*So. La. II*). *See* Area Rate Proceeding, *et al.* (Southern Louisiana Area), 46 F.P.C. 86, 110-16 (1971), *aff'd sub. nom.* Placid Oil Co. v. FPC, 483 F.2d 880 (5th Cir. 1973), *aff'd sub nom.* Mobil Oil Corp. v. FPC, 417 U.S. 283 (1974). The defendants' argument in FTC v. Texaco, Inc., 555 F.2d 862 (D.C. Cir.) (en banc), *cert. denied,* 431 U.S. 974 (1977), assumes that if the estimates were accurate, the FTC's theory of anticompetitive reporting techniques must fail because any such illegal activity would involve attempts to manipulate gas rates through inaccurate reserve estimates. The defendants alleged that the FTC was trying to review the FPC's finding that the reserves estimates were accurate, and collateral estoppel must deny the FTC access to the materials subpoenaed for this purpose. Joint Memorandum of Respondents in Opposition to FTC Petitions for Enforcement at 41-51, FTC v. Texaco, Inc., No. 1089-73 (D.D.C., March 22, 1974).

4. The collateral estoppel defense was also raised unsuccessfully in subpoena enforcement proceedings in FTC v. Feldman, 532 F.2d 1092 (7th Cir. 1976), and FTC v. Markin, 532 F.2d 541 (6th Cir. 1976). *See* note 14 *infra.*

on any of the defenses raised, the court ruled that it would be "improper" to allow the Commission to reinvestigate the gas reserve estimates.[5] The court of appeals panel affirmed the district court's order unanimously by holding that collateral estoppel supported modification of the subpoenas.[6] But the court of appeals vacated the panel decision, reheard the case en banc, and voted four to two to reverse the district court's judgment.[7]

Writing for the majority, Judge Bazelon held that collateral estoppel was a substantive defense, inappropriate at the subpoena stage of an administrative proceeding "when the agency lacks the information to establish its case."[8] Judge Leventhal's concurring opinion reached the merits of the collateral estoppel defense and concluded that estoppel should not be enforced in the instant case. Because quasi-legislative agency activities such as ratemaking are generally considered to be immune from collateral estoppel, Judge Leventhal decided that the FTC could not properly be bound by a judgment in a ratemaking proceeding.[9] Judge Wilkey's dissent responded that collateral estoppel was an appropriate defense to an administrative subpoena and that deferring consideration of collateral estoppel until the complaint stage "[did] violence to the sound policy justifications underlying the doctrine."[10] Further, Judge Wilkey argued that estoppel should be enforced notwithstanding that the original decision on the reserve estimates issue took place in the context of a ratemaking proceeding.[11]

The split in the *Texaco* court reflects the divisions that exist among

5. *See* FTC v. Texaco, Inc., No. 1089-73 (D.D.C., March 22, 1974), *reprinted in* FTC v. Texaco, Inc., 517 F.2d 137, 159-62 (D.C. Cir. 1975), *rev'd en banc,* FTC v. Texaco, Inc., 555 F.2d 862 (D.C. Cir.), *cert. denied,* 431 U.S. 974 (1977).

6. FTC v. Texaco, Inc., 517 F.2d 137, 147 (D.C. Cir. 1975), *rev'd en banc,* FTC v. Texaco, Inc., 555 F.2d 862 (D.C. Cir.), *cert. denied,* 431 U.S. 974 (1977).

7. 555 F.2d 862 (D.C. Cir.) (en banc), *cert. denied,* 431 U.S. 974 (1977).

8. *Id.* at 879; *see id.* at 877-81 (discussion by Judge Bazelon).

9. *Id.* at 893 (concurring opinion). *See* Arizona Grocery Co. v. Atchison, T. & S.F. Ry., 284 U.S. 370, 389 (1932) (collateral estoppel is inapplicable to agency fulfilling legislative function like ratemaking). Judge Leventhal's argument assumes that because an agency engaged in a ratemaking proceeding could not be bound by previous findings, or rates, no agency could be bound by a finding of another agency that had been engaged in ratemaking. *But see* note 56 *infra.*

10. 555 F.2d at 926 (dissenting opinion).

11. In his opinion for the unanimous circuit court panel, Judge Wilkey emphasized that the FTC knew of the FPC's adjudicative proceedings in *So. La. II* when it initiated its investigation and could have intervened in the proceeding. When he turned to the FPC proceedings, he found that "an area rate proceeding, bringing together as it does sharply divergent economic interests in the same arena to do battle, provided an excellent context in which to resolve such an issue. The record clearly indicates . . . an adversarial environment . . . ." FTC v. Texaco, Inc., 517 F.2d 137, 147 (D.C. Cir. 1975), *rev'd en banc,* FTC v. Texaco, Inc., 555 F.2d 862 (D.C. Cir.), *cert. denied,* 431 U.S. 974 (1977).

the circuits in their treatment of collateral estoppel in the discovery stage of administrative proceedings. The *Texaco* majority opinion cites two recent cases that reject per se the collateral estoppel defense to administrative subpoenas.[12] The courts of appeals in those cases relied on a series of precedents in which the Supreme Court[13] was extremely protective of agency subpoenas.[14]

The *Texaco* dissenters argued that the Supreme Court has never addressed the question of the collateral estoppel defense to administrative subpoenas.[15] Moreover, the dissent relied on a Second Circuit case, *Safir v. Gibson*,[16] in which Judge Friendly enforced estoppel

12. FTC v. Markin, 532 F.2d 541 (6th Cir. 1976); FTC v. Feldman, 532 F.2d 1092 (7th Cir. 1976). *See* note 14 *infra*.

13. In response to private party challenges to administrative subpoenas, the Supreme Court has severely limited the defenses available to the challenging party. *E.g.*, United States v. Morton Salt Co., 338 U.S. 632, 652 (1950) (denying due process challenge to FTC document request: "it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant"); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 209 (1946) (responding to Fourth Amendment challenge to administrative subpoena: "It is enough that the investigation be for a lawfully authorized purpose . . . ."); Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 509 (1943) (courts should deny jurisdictional challenge if subpoena is reasonably relevant to matter within agency's authority). The lower courts have followed the *Endicott Johnson* rule when evaluating jurisdictional challenges to administrative subpoenas. *See, e.g.*, Federal Maritime Comm'n v. Port of Seattle, 521 F.2d 431, 434 (9th Cir. 1975); note 45 *infra*. Further, the circuits have applied to collateral estoppel defenses the standards for subpoena review outlined by the Court in these cases. *See, e.g.*, FTC v. Texaco, Inc., 555 F.2d 862, 879 (D.C. Cir.) (en banc), *cert. denied*, 431 U.S. 974 (1977) (citing *Endicott Johnson* as controlling Texaco's collateral estoppel defense); FTC v. Feldman, 532 F.2d 1092, 1095-96 (7th Cir. 1976) (beginning analysis of collateral estoppel defense to subpoena with statement of *Oklahoma Press* rule).

14. But the courts in FTC v. Feldman, 532 F.2d 1092 (7th Cir. 1976), and FTC v. Markin, 532 F.2d 541 (6th Cir. 1976), did not rest on the Supreme Court cases alone. In both cases the defendants argued that judgments in their favor in an earlier case brought pursuant to the Sherman Act prevented the FTC from relitigating the same issues. The court in each case ruled that the former judgments, in United States v. Yellow Cab Co., 338 U.S. 338 (1949), did not bar the FTC subpoenas. Like Judge Leventhal in his concurring opinion in FTC v. Texaco, Inc., 555 F.2d 862, 893 (D.C. Cir.) (en banc), *cert. denied*, 431 U.S. 974 (1977) (concurring opinion), the courts in both of these cases proceeded to the merits of the collateral estoppel defense. In *Feldman* the court emphasized that the original Sherman Act prosecution and judgment was more than 25 years old and that the facts and circumstances had probably changed. The court distinguished the panel decision in *Texaco* because in that case the FPC and FTC investigations took place concurrently, and thus coordination of agency action was possible. Moreover, the *Feldman* court stressed that the two agencies in *Texaco* examined estimates for the same years. 532 F.2d at 1097. In *Markin* the court also questioned whether the previous judgment addressed the same issues as the instant investigation. The court argued that since the Federal Trade Commission Act's scope exceeded that of the Sherman Act, the earlier judgment of the defendant's conduct could not foreclose suit under a different standard. 532 F.2d at 544.

15. 555 F.2d at 927-29 (Wilkey, J., dissenting).

16. 432 F.2d 137 (2d Cir.), *cert. denied*, 400 U.S. 850 (1970). *See* notes 30, 95 *infra*.

before discovery was completed in an administrative proceeding.[17] Judge Friendly's language is broad enough to endorse estoppel at the subpoena stage of an administrative proceeding:

> We recognize there is a general rule against judicial interference with administrative proceedings prior to the issuance of a final order . . . . [Nevertheless] the reason for applying *res judicata* to administrative agencies is not only to "enforce repose" but also to protect a *successful party* from being vexed with needlessly duplicitous [*sic*] proceedings. . . . If the latter interest is not protected at the *outset* of the second proceeding, it will be lost irreparably.[18]

This Note analyzes the collateral estoppel defense to administrative subpoenas. Part I traces the evolution of collateral estoppel in the courts and the application of collateral estoppel to administrative agencies. It then focuses on the specific problem of the *Texaco* litigation—the application of estoppel to an administrative subpoena—and describes the goals that an effective subpoena estoppel policy should achieve. Part II addresses two obstacles to an effective subpoena estoppel policy: (i) limits placed on other subpoena defenses, and (ii) limits placed on collateral estoppel outside the administrative subpoena context. Part III suggests an alternative set of considerations for analyzing an estoppel defense to a subpoena. These considerations are employed in Part IV to construct a proposed rule for applying collateral estoppel to an administrative subpoena. The rule is then applied in Part V to two hypothetical subpoena estoppel cases.

I. Collateral Estoppel and Administrative Subpoenas

Developed by the courts in the interests of equity, collateral estoppel can be invoked by a party to a new proceeding to give binding

17. In Safir v. Gibson, 432 F.2d 137 (2d Cir.), *cert. denied*, 400 U.S. 850 (1970), a claimant brought an action before the Federal Maritime Administration (FMA) to recover damages for discriminatory pricing. The Federal Maritime Commission (FMC) had previously found that the same defendants, members of a steamship conference, set unreasonably low rates in an effort to drive out competitors in violation of the Shipping Act of 1916, § 15, 46 U.S.C. § 814 (Supp. V 1975). The second proceeding, before the FMA, was to determine whether the plaintiff could recover subsidies pursuant to the Merchant Marine Act of 1936, § 810, 46 U.S.C. § 1227 (1970). Judge Friendly ordered that the FMA not relitigate the unjust discrimination issue, the key element of a § 810 violation, as the FMC adjudication based on the Shipping Act collaterally estopped the agency. *See* p. 1267 & note 95 *infra*.

18. 432 F.2d at 143 (emphasis added).

effect to determinations of issues resolved in a former judgment.[19] Although traditional collateral estoppel doctrine required an identity of parties in the two actions,[20] this formal requirement has been relaxed.[21] Collateral estoppel now may be invoked by a nonparty to the original action against both original parties and litigants deemed to be in privity with original parties.[22] Collateral estoppel, then, does not merely freeze a relationship between two parties to a judgment, but instead limits each individual to one opportunity to litigate a given issue.[23]

The application of collateral estoppel to administrative proceedings was a natural extension. Not only did it coincide with the expansion of collateral estoppel generally, but it also reflects the fact that the number of cases formally adjudicated in federal agencies now easily exceeds the number of cases filed in the federal courts.[24] Supreme Court decisions now establish that the collateral estoppel principle is available to litigants in the burgeoning field of administrative adjudication. In *Sunshine Anthracite Coal Co. v. Adkins*,[25] the Supreme Court found privity between officers of the same government.[26] In *United States v. Utah Construction & Mining*

19. *See* F. JAMES & G. HAZARD, CIVIL PROCEDURE § 11.16, at 563-64 (2d ed. 1977) (collateral estoppel, or issue preclusion, is available "even though the second action involves a different claim or cause of action") (citing Cromwell v. County of Sac, 94 U.S. 351, 353 (1877)).

20. *See* Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111 (1912); RESTATEMENT OF JUDGMENTS § 93(b) (1942).

21. The identity of parties requirement was also expressed in terms of a mutuality of estoppel rule. Under the rule, any individual wishing to invoke estoppel against another party would have to be subject to a reciprocal claim if the original judgment were to be reversed or had it been favorable instead to the second party originally. The mutuality rule effectively would prevent any expansion of estoppel doctrine in favor of individuals not parties to the first action.

This rigid rule was attacked in Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n, 19 Cal. 2d 807, 122 P.2d 892 (1942), which rejected the requirement that a party claiming estoppel must have been a party (and so be "bound") to the first action. *Id.* at 812, 122 P.2d at 895. *See* Vestal, *Preclusion/Res Judicata Variables: Parties*, 50 IOWA L. REV. 27, 43-76 (1964). The Supreme Court expressly approved of *Bernhard* in Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313, 324-25 (1971).

22. Privity can exist because one party is vested with authority to represent another party in litigation (as in a class action or through assignment of a claim), or because of the parties' substantive relationship (family, organizational affiliation). *See* F. JAMES & G. HAZARD, *supra* note 19, at §§ 11.26-11.29.

23. Accordingly, courts have rejected the mutuality rule in a wide range of litigation and have focused on the estopped party's opportunity to litigate the issue in question. *See* Note, *Collateral Estoppel Effect of Agency Actions in Civil Litigation*, 46 GEO. WASH. L. REV. 65, 78 n.99 (1977).

24. *See* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 1.02, at 4 (Supp. 1970).

25. 310 U.S. 381 (1940).

26. *Id.* at 402-03. The Court did not permit the private party defendant to relitigate the validity of an exemption in a suit brought by the Commissioner of Internal Revenue after the defendant had lost that issue in litigation before the National Bituminous

Co.,[27] the Court cited with approval lower court cases that enforced estoppel on the basis of a prior agency adjudication.[28] Taken together with the Court's decision in *Sunshine, Utah Construction* binds one agency to the administrative adjudications of another.[29]

Judge Friendly argued in *Safir v. Gibson* that if the interest of private parties in protection from "needlessly [duplicative] proceedings" "is not protected at the outset of the second proceeding, it will be lost irreparably."[30] The rationale of collateral estoppel is to bring

Coal Commission. Estoppel thus worked offensively to help the government prove its case. The Court held: "There is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is *res judicata* in relitigation of the same issue between that party and another officer of the government." *Id.* The *Sunshine* principle has been adopted by state courts as well. *See generally* Rynsburger v. Dairymen's Fertilizer Coop., 266 Cal. App. 2d 269, 72 Cal. Rptr. 102 (1968); RESTATEMENT (SECOND) OF JUDGMENTS § 85(1)(d) (Tent. Draft No. 2, 1975).

Sunshine accomplished through the privity concept what Bernhard v. Bank of America, Nat'l Trust & Sav. Ass'n, 19 Cal. 2d 807, 122 P.2d 892 (1942), had achieved through a direct attack on traditional collateral estoppel rules: extension of the binding effect of a judgment beyond the original parties. But the privity concept binds the government only to the specific issues adjudicated in a given case; privity does not commit any governmental department or agency to abandonment of the general policy or position that underlay the original investigation and adjudication. *See generally* Vestal, *Relitigation by Federal Agencies: Conflict, Concurrence, and Synthesis of Judicial Policies,* 55 N.C.L. REV. 123 (1977).

27. 384 U.S. 394 (1966). In *Utah Construction* estoppel was claimed by the government defensively to shield against a contract claim previously decided in the government's favor by an administrative agency. The Court stated: "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose." *Id.* at 422.

28. The Court cited Fairmont Aluminum Co. v. Commissioner, 222 F.2d 622 (4th Cir.), *cert. denied,* 350 U.S. 838 (1955) (collateral estoppel applied to findings of administrative agency). The Court also suggested that Commissioner v. Sunnen, 333 U.S. 591 (1948), contemplated the application of res judicata to administrative findings. 384 U.S. at 422.

29. If one federal agency were to lose a claim in an administrative proceeding, a second federal agency could be estopped from asserting that claim, or the same issues, against the same defendant. *See, e.g.,* United States v. Willard Tablet Co., 141 F.2d 141 (7th Cir. 1944), *discussed at* note 91 *infra.* The defendant's argument would rest on the Supreme Court's holding in Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940), *discussed at* notes 25-26 *supra,* that privity existed between federal officers.

If the first federal agency won the original claim against the defendant, a second federal agency could use estoppel offensively to deny the defendant the opportunity to contest issues previously decided. *See* Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940), *discussed at* notes 25-26 *supra* (res judicata was used offensively by government to prove its tax case); Safir v. Gibson, 432 F.2d 137 (2d Cir.), *cert. denied,* 400 U.S. 850 (1970) (estoppel used offensively, though for benefit of private party plaintiff); RESTATEMENT (SECOND) OF JUDGMENTS § 88, Reporter's Note at 99 (Tent. Draft No. 2, 1975) (distinctions between offensive and defensive use of estoppel have not been widely accepted). *But see* McCook v. Standard Oil Co., 393 F. Supp. 256, 258 (C.D. Cal. 1975) (mutuality rule retained to limit offensive use of estoppel, although its abandonment is justified when estoppel is used defensively).

30. Safir v. Gibson, 432 F.2d 137, 143 (2d Cir.), *cert. denied,* 400 U.S. 850 (1970).

about finality and prevent duplicative litigation.[31] But given the vexatiousness of administrative discovery,[32] the parties' interest in finality should be recognized before the value of finality has been lost. Estoppel at the subpoena stage would serve the goal of finality by forbidding not only relitigation but also rediscovery of issues previously decided in a competent forum.

The application of collateral estoppel to administrative subpoenas nevertheless creates special problems. Collateral estoppel at the subpoena stage could seriously impede agency enforcement efforts if the estoppel were to exceed the scope of issues previously decided. The Administrative Procedure Act (APA) [33] requires an investigating agency to state the purpose of its inquiry at the outset.[34] So long as the purpose of the inquiry is lawful,[35] a party can be required to produce specific documents if those documents are reasonably relevant[36] to the agency's investigative purpose. A successful collateral estoppel defense to an administrative subpoena would deny the agency access to documents or other materials that are relevant only to an issue already decided by another agency. Yet the documents in question might be relevant to another subject that is outside the stated purpose of the inquiry but within the agency's jurisdiction. To deny enforcement of a subpoena on the basis of a prior administrative adjudication of a given issue prevents the agency not only from retrying that

31. *See* Commissioner v. Sunnen, 333 U.S. 591, 599-602 (1948); F. JAMES & G. HAZARD, *supra* note 19, § 11.2, at 532 ("[The res judicata rules give] recognition to the fact that the purpose of a lawsuit is not only to do substantial justice but to bring an end to controversy."); Note, *supra* note 23, at 69.

32. *See* Wall St. J., Nov. 2, 1977, at 15, col. 1 (FTC attorney suggests that discovery in current FTC suit against major oil companies will amount to 40 million pages); Affidavit Submitted on Behalf of Texaco, Inc., in Support of Respondents' Joint Response to Complaint Counsel's Motion for Issuance of Subpoenas *Duces Tecum* at 4, *In re* Exxon Corp., No. 8934 (FTC July 17, 1973) (Texaco's actual cost to evaluate 1800-page FTC subpoena in excess of $200,000); Letter from Sharon Jacobs, Legal Dep't, Texaco, Inc. (Jan. 6, 1978) (estimates of compliance costs in *Exxon* case range from $20 million to $150 million, or from 750 to 6,700 man-years) [on file with *Yale Law Journal*]; Brief for Appellee at 7, FTC v. Texaco, Inc., 517 F.2d 137 (D.C. Cir. 1975), *rev'd en banc,* 555 F.2d 862 (D.C. Cir.), *cert. denied,* 431 U.S. 974 (1977) (compliance with FTC subpoenas would cost several million dollars and thousands of man-hours of effort).

33. 5 U.S.C. §§ 551-559 (1970).

34. 5 U.S.C. § 555(d) (1970) (party entitled to showing of general relevance and to reasonableness of scope of evidence "when required by rules of procedure"). *See* FTC v. Texaco, Inc., 555 F.2d 862, 905 (D.C. Cir.) (en banc), *cert. denied,* 431 U.S. 974 (1977) (Wilkey, J., dissenting).

35. The "lawful purpose" requirement is satisfied if the inquiry focused on a subject within the agency's jurisdiction. The origin and development of the "lawful purpose" standard is discussed at pp. 1256-57 & notes 45-48 *infra.*

36. The "reasonable relevance" requirement is satisfied if the requested documents were remotely material to the agency's purpose. The development of the "reasonable relevance" standard is discussed in notes 44-45 *infra.*

issue but also from framing new issues for inquiry based on materials the agency would otherwise receive.[37] If the agency has no other basis for formulating issues for inquiry, estoppel of a subpoena could prevent the agency from reaching issues that have not been decided.

Subpoena estoppel policy, therefore, should reconcile the competing interests of finality and thorough agency law enforcement. Indeed, an effective subpoena estoppel policy should go beyond accommodating these interests and should further more efficient law enforcement by encouraging agency cooperation in areas of overlapping jurisdiction.[38] By forbidding an agency from rediscovering and relitigating an issue decided in an earlier administrative adjudication, subpoena estoppel policy could encourage the FTC and other agencies to develop rules that permit coordinate agency intervention.[39] Because sub-

37. Judge Wilkey's dissent in FTC v. Texaco, 555 F.2d 862 (D.C. Cir.) (en banc), *cert. denied*, 431 U.S. 974 (1977) (dissenting opinion), ignores this problem. "[Unlike applying res judicata], *to apply the doctrine of collateral estoppel . . . we need not attempt to forecast the ultimate conclusion . . . of the FTC's proposed investigation; we need only define ONE FACTUAL ISSUE . . . which has already been determined . . .*." 555 F.2d at 929 (emphasis in original).

As noted in text, the gulf between res judicata and collateral estoppel narrows in the subpoena context, because collateral estoppel of a subpoena could effectively deny an agency access to issues in addition to those previously decided. Although documents can be obtained by subsequent subpoenas requesting documents responsive to the "second issue," the agency might never obtain access to material giving rise to the second line of inquiry. This "secondary estoppel" problem is most significant when an agency is first beginning an investigation, is less likely to have focused the theory underlying the inquiry, and has no means of comparing the relative merits of alternative avenues of investigation. *See* p. 1268 *infra*.

38. Agency overlap can be traced to the manner in which agency jurisdiction is defined. The FTC has broad jurisdiction over trade practices. Other agencies have primary responsibility for particular activities, *e.g.*, investment markets (Securities and Exchange Commission), entry into certain industries (Interstate Commerce Commission, Civil Aeronautics Board), rates charged by certain enterprises (Federal Communications Commission), but none of these activities excludes the other. In the *Texaco* case, both the FTC and the FPC were interested in the reporting of gas reserves, which is significant both for rates and for competition within the industry. Because a given transaction can have significance for investors, consumers, and competitors simultaneously, the agencies' interests frequently overlap. *See generally* B. SCHWARTZ & H. WADE, LEGAL CONTROL OF GOVERNMENT: ADMINISTRATIVE LAW IN BRITAIN AND THE UNITED STATES 27-30 (1972), *excerpted in* W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW 8-11 (1974).

39. The FPC specifically allows state agency intervention under 16 U.S.C. § 825(g) (1970); a more general FPC intervention rule is listed at 18 C.F.R. § 1.8 (1977). The SEC's general intervention rule can be found at 17 C.F.R. § 201.9(a) (1977). *See also* 16 C.F.R. § 4.6 (1977) ("[I]t is the policy of the [Federal Trade] Commission to cooperate with other governmental agencies to avoid unnecessary overlapping or duplication of regulatory functions.")

The FPC proceeding in the *Texaco* case employed the intervenor rules. Judge Wilkey, in his dissent, noted that a variety of public and private interests was represented at the Power Commission hearings. 555 F.2d at 931. Although the intervenor rules are generally used for representation of other private parties, no construction of the standards for intervention—the rules defining standing to intervene—should deny such a right to an agency seeking to avoid later estoppel on the matters being investigated.

Avoidance of prejudice to a subsequent proceeding might well qualify even under

poena estoppel would increase the availability of collateral estoppel in administrative proceedings generally, it would serve administrative efficiency by making rediscovery and relitigation of some matters unnecessary.[40]

To further these goals of finality, thorough agency law enforcement, and administrative efficiency, a subpoena estoppel defense must not generate more litigation costs than it avoids. A private party would be unlikely to resort to the estoppel defense if compliance with the subpoena cost less than litigating the estoppel question. Thus the framework for analyzing a collateral estoppel defense must itself reflect the underlying purpose of estoppel—the avoidance of unnecessary litigation.

II. Barriers to an Effective Subpoena Estoppel Policy

A. *Limits Placed on Other Subpoena Defenses*

United States v. Morton Salt Co.[41] exemplifies the deference paid by the Supreme Court to administrative subpoenas. In that case the Court allowed an agency "fishing expedition" based on no more than "official curiosity."[42] The Court said the subpoenas should be enforced if the demand was not too indefinite and if the material sought was reasonably relevant to a lawful administrative purpose.[43] Rigidly

the "intervention by right" standard of FED. R. CIV. P. 24(a). *See generally* Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators,* 81 HARV. L. REV. 721, 731-35 (1968) (discussing intervention rules and suggesting that expansion of governmental intervention is "plainly desirable"). *Cf.* MacIntyre & Volhard, *Intervention in Agency Adjudications,* 58 VA. L. REV. 230, 232 (1972) (addressing FTC rules for intervention by private parties representing public interest).

40. Although mutuality of estoppel is somewhat discredited, *see* note 21 *supra,* broader application of collateral estoppel as a shield in administrative law will make estoppel more available to the agencies as a sword. *Cf.* North Carolina v. Chas. Pfizer & Co., 537 F.2d 67 (4th Cir. 1976), *cert. denied,* 429 U.S. 870 (1977) (because defendants could not use favorable FTC judgment as bar to Sherman Act suit, court refused to allow government prosecutors to use FTC findings to prove essential elements of Sherman Act prosecution); RESTATEMENT (SECOND) OF JUDGMENTS § 88, Reporter's Note at 99 (Tent. Draft No. 2, 1975) (criticizing distinctions in availability of estoppel based on offensive or defensive application). The overlap-of-issues standard recommended by this Note, *see* pp. 1266-67 *infra,* would of course be available to the agencies to facilitate proof of claims against defendants. If the second agency could take advantage of the previous adjudication, relitigation and rediscovery would be unnecessary.

41. 338 U.S. 632 (1950).

42. *Id.* at 641, 652. In *Morton Salt* a private corporation objected to an FTC requirement that it file periodic reports to prove compliance with a court-approved cease-and-desist order. The Court rejected the defendant's contention that the FTC subpoenas violated the due process clause of the Fifth Amendment. The Court held that the agency's subpoena power extended beyond cases and controversies and supported the subpoena. 338 U.S. at 641-43.

43. *Id.* at 652.

applied, this rule would effectively foreclose the collateral estoppel defense to administrative subpoenas. None of the elements of the Court's enforcement standard—definiteness, relevance, and lawful purpose—has provided for significant judicial supervision of administrative subpoenas.[44]

Yet the Court adopted this standard in contexts presenting far different considerations from those involved in a collateral estoppel defense. *Morton Salt*'s "lawful purpose" standard represents the Court's response to jurisdictional defenses to subpoenas.[45] The Supreme Court

44. Although the Court listed "definiteness" as an independent requirement for enforcement of a subpoena in *Morton Salt, id.*, the Court neglected that element in Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 209 (1946), *discussed at* note 13 *supra*. Although lower courts continue to list "definiteness" as an independent element of the *Morton Salt* standard, no court has denied enforcement of a subpoena on this ground alone. In practice, definiteness is merged with relevance. *Compare* Adams v. FTC, 296 F.2d 861 (8th Cir. 1961), *cert. denied*, 369 U.S. 864 (1962) (court listed definiteness as independent part of *Morton Salt* standard) *with* Schultz v. Yeager, 293 F. Supp. 794 (D.N.J. 1967), *aff'd*, 403 F.2d 639 (3d Cir. 1968), *cert. denied*, 394 U.S. 961 (1969) (subpoena unlimited as to relevance or specificity violated Fourth Amendment). *See* note 45 *infra*. *See generally* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 3.06, at 188-89 (1958).

The relevance requirement is no longer an important vehicle for judicial control of administrative subpoenas. *Compare* FTC v. American Tobacco Co., 264 U.S. 298, 306 (1924) (agency must provide court with evidence of a given document's materiality before court will order production) *with* United States v. Morton Salt Co., 338 U.S. 632, 652 (1950) (sufficient to show that inquiry is within agency's authority, demand is not too indefinite, and information sought is reasonably relevant). *See generally* 1 K. DAVIS, *supra* § 3.06, at 183-88.

The "lawful purpose" of the investigating agency extends at least as far as its subject-matter jurisdiction, because the Court has made clear that the agencies, and not the courts, should first evaluate those facts that support the agencies' jurisdiction. *See* Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 509 (1943). Although the lawful purpose standard cannot serve as a real basis for challenging an agency's jurisdiction at the subpoena stage, lawful purpose cannot be strictly equated with subject-matter jurisdiction, because to do so ignores accepted substantive subpoena defenses. *E.g.*, Bell v. Maryland, 378 U.S. 226, 263 (1964) (Douglas, J., concurring) (attorney-client privilege would protect some corporate documents from discovery even if those documents were relevant to inquiry within agency's subject-matter jurisdiction); Gibson v. Florida Legislative Investigation Comm'n, 372 U.S. 539 (1963) (request for membership list of NAACP infringes rights of free and private association). *Morton Salt*'s "lawful purpose" requirement could be the vehicle for a nonjurisdictional subpoena defense such as collateral estoppel.

45. The Supreme Court held in Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 509 (1943), that the private party's challenge to the Department of Labor's jurisdiction was premature as a defense in a subpoena enforcement proceeding, unless the material requested was plainly irrelevant to any lawful purpose of the Secretary of Labor. The circuits have generally followed this limited rule. *See* Blue Ribbon Quality Meats v. FTC, 560 F.2d 874 (8th Cir. 1977); FTC v. Swanson, 560 F.2d 1 (1st Cir. 1977); FTC v. Gibson, 460 F.2d 605 (5th Cir. 1972). *But see* FTC v. Miller, 549 F.2d 452, 456 (7th Cir. 1977) (court denied enforcement of FTC subpoena because common carrier defendant was "plainly exempt" from agency's jurisdiction). In later cases, the limitation placed on jurisdictional challenges to subpoenas—the *Endicott Johnson* rule—became the standard for court enforcement of a subpoena. The Court relied on *Endicott Johnson* to refute nonjurisdictional subpoena defenses. *See* Oklahoma Press Publishing Co. v. Walling, 327

has consistently protected administrative subpoenas from objections to jurisdiction and has warned against denying agencies access to "jurisdictional facts."[46] Lower courts have responded by protecting agency subpoenas seeking arguably jurisdictional facts,[47] even when the party objecting to the subpoena presented a collateral estoppel (as opposed to a jurisdictional) defense.[48]

When a case involves either exhaustion of remedies[49] or primary jurisdiction,[50] jurisdictional facts should be determined by an agency at the outset of an investigation. Both doctrines involve choosing be-

U.S. 186, 209-11 (1946); note 13 *supra*. The "definiteness" requirement deflected a Fourth Amendment challenge to a subpoena in Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 209 (1946).

46. Jurisdictional facts are those facts on which a forum's jurisdiction depends. *See* Crowell v. Benson, 285 U.S. 22, 54-57 (1932) (jurisdiction of United States Employees' Compensation Commission depended on whether or not injury occurred on navigable waters of U.S. and whether or not claimant was employed by interstate shipper).

47. *See* notes 13 & 45 *supra*. The jurisdictional facts concept protected an administrative subpoena in Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 201, 213-14 (1946). Before complying with a subpoena, a publishing company sought to require that the FTC establish statutory authority over it. The Court rejected this defense and held that the agency could not be denied access to the very information that would support its inquiry.

Oklahoma Press can be read narrowly as holding that jurisdictional objections are premature at the subpoena stage. A more expansive reading concludes that the jurisdictional facts must be delivered to the administrative agency, regardless of the defense to the subpoena in question. *See, e.g.*, FTC v. Feldman, 532 F.2d 1092, 1095 (7th Cir. 1976) (subpoenas must be enforced so agency can determine its own jurisdiction and possible collateral estoppel); FTC v. Markin, 532 F.2d 541, 544 (6th Cir. 1976) (question of collateral estoppel is for agency to evaluate after subpoenas are enforced).

48. *See* FTC v. Texaco, Inc., 555 F.2d 862, 880-81 (D.C. Cir.) (en banc), *cert. denied*, 431 U.S. 974 (1977) (approving Seventh Circuit's use of jurisdictional facts concept in FTC v. Feldman, 532 F.2d 1092, 1095 (7th Cir. 1976), *see* note 47 *supra*, to evaluate collateral estoppel defense); Reply Brief for Appellant at 13-14, FTC v. Texaco, Inc., *id.* (in response to defendants' collateral estoppel defense, FTC argued that restriction of access to jurisdictional facts amounted to imposition of "unlawful prior restraint").

49. Exhaustion of remedies requires that claims within the jurisdiction of an agency be raised with the agency before a litigant has access to the courts. It allows the specialized agency the first opportunity to pass on administrative questions and to achieve uniformity and consistency. *E.g.*, Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 441-43 (1903). *See* Far East Conference v. United States, 342 U.S. 570, 574 (1952) (exhaustion of remedies principle guarantees that private party can not pass over agency that has jurisdiction over claim in question). *See generally* 3 K. DAVIS, *supra* note 44, at §§ 20.00-.10. The jurisdictional facts doctrine (the protection of agency subpoenas from jurisdictional attacks, *see* notes 47-48 *supra*) furthers the principle of exhaustion of remedies.

50. The primary jurisdiction principle requires that issues within the jurisdiction of an agency be referred to that agency by the court, even if the litigant's claim as a whole is cognizable by the court. *See* United States v. Western Pac. Ry., 352 U.S. 59, 63 (1956); 3 K. DAVIS, *supra* note 44, at § 19.01. Like the exhaustion of remedies principle, *see* note 49 *supra*, primary jurisdiction determines the forum in which a matter will be litigated first, rather than whether an issue needs to be reopened. *See* United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 353 (1963) (determination that agency has primary jurisdiction of issue does not mean that court's jurisdiction is ousted, but rather that it is postponed).

tween a court and an agency as a trier of fact, and because agencies are thought to possess expertise in examining facts within their jurisdiction, the agency is considered the appropriate fact-finder.[51] Collateral estoppel, however, can be invoked only when an issue has been decided in a prior proceeding. Thus the question is not which forum should discover and adjudicate the issue, but whether the issue should be reexamined. When a coordinate federal agency has already conducted an investigation and reached a judgment on the contested issue, the facts underlying that issue have already been determined by an agency with administrative expertise.[52] Judicial deference to agency expertise thus does not require relitigation or rediscovery of those facts.

Blanket protection of jurisdictional facts does not serve the goals of an effective subpoena estoppel policy. Efficient law enforcement is not encouraged when agencies are permitted to discover the same factual issue twice. Deference to jurisdictional facts effectively sacrifices the private party's interest in finality; the private party should not be penalized because a previously litigated issue rests on factual matters that are at the border of a second agency's jurisdiction. Finally, defining what constitutes a jurisdictional fact has been a notoriously intractable enterprise.[53] Since both the *Morton Salt* standard and the jurisdictional facts principle were developed primarily in re-

51. In Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938), a corporation sought to enjoin an NLRB proceeding on jurisdictional grounds. The Court made clear that if the exhaustion of remedies principle were to be viable, jurisdictional challenges would have to await discovery of jurisdictional facts by the agency. Otherwise, "[we would] substitute the District Court for the Board as the tribunal to hear and determine what Congress declared the Board exclusively should hear and determine in the first instance." *Id.* at 50. But if the private party objected on estoppel grounds, the court would not have to usurp the agency's role. The court could instead accept and apply the judgment of an agency created to discover and adjudicate the issue in question.

52. The second agency will also bring administrative expertise to the proceedings. But collateral estoppel requires an identity of issues, *see* pp. 1266-67 & notes 89-92 *infra*, and the Supreme Court stated in United States v. Utah Constr. & Mining Co., 384 U.S. 394 (1966), that the value of finality is the controlling factor once an agency with expertise has adjudicated a given issue. Assuming that the identity of issues is present, *Utah Construction*'s disposition of the balance between enforcement and finality should also foreclose rediscovery.

53. Because a main goal of estoppel is to limit litigation, reliance on factors likely to introduce the merits of a dispute is self-defeating. But it is often difficult to separate determination of jurisdictional facts from the merits of a dispute. For a classic example of the difficulty of ascertaining jurisdictional facts, see United States v. Ju Toy, 198 U.S. 253 (1905). An individual of Chinese descent left the United States and then sought to return. The immigration officials barred him at the border and claimed that he was a foreigner. He sought immunity from the jurisdiction of the immigration officials by claiming he was a citizen. Thus the jurisdictional facts and the merits of the dispute became meshed. *See generally* Rogat, *Mr. Justice Holmes: A Dissenting Opinion*, 15 STAN. L. REV. 1, 22-39 (1962) (discussing *Ju Toy* and other leading jurisdictional facts cases).

sponse to jurisdictional challenges to agency subpoenas,[54] they are not responsive to the interests at stake when a private party raises a collateral estoppel defense to an administrative subpoena.

B. *Limits Placed on Collateral Estoppel outside the Administrative Subpoena Context*

A second group of obstacles to an effective subpoena estoppel policy consists of limits placed on collateral estoppel outside the subpoena context. In *Utah Construction* the Supreme Court found collateral estoppel applicable when administrative agencies act in a judicial capacity.[55] Nonadjudicative proceedings such as ratemaking are not subject to collateral estoppel.[56]

In the *Texaco* case, the FTC sought to take advantage of this limit on administrative collateral estoppel. The Commission argued that because the Federal Trade Commission Act[57] encourages the FTC to make reports to Congress regarding proposed legislation, an FTC investigative subpoena should not necessarily be treated as part of an adjudicative proceeding, subject to collateral estoppel.[58] It is true that a nonadjudicative procedure should not be subject to collateral estoppel. Yet some agencies, including the FTC, establish wholly separate procedures for adjudicative and nonadjudicative proceedings, so a court can easily identify nonadjudicative subpoenas issued by such agencies.[59] A court can also demand that documents obtained by nonadjudicative subpoenas be sequestered from an agency's adjudicative

54. *See* notes 13 & 45 *supra.*

55. *See* note 27 *supra.*

56. Another possible implication of the Court's language in *Utah Construction* is that a nonadjudicative, quasi-legislative proceeding such as ratemaking would be an inappropriate base for a collateral estoppel claim. This was Judge Leventhal's argument in the concurring opinion of the *Texaco* case, *see* note 9 *supra.* But this limitation is unnecessary. When an agency acts in a legislative capacity, it should not be bound by any previous finding of fact or law, whatever its source. But if in the course of a quasi-legislative proceeding, an agency holds hearings that provide both sides with the same procedural rights and access to the decisionmaking process provided by formal adjudication, no purpose is served by requiring the parties to relitigate in subsequent adjudication the issues concluded.

57. Federal Trade Commission Act of 1914, § 5, 15 U.S.C. § 45 (1970).

58. *See* Reply Supplemental Brief on Rehearing En Banc for Appellant at 23-24, FTC v. Texaco, Inc., 555 F.2d 862 (D.C. Cir.) (en banc), *cert. denied,* 431 U.S. 974 (1977); Brief for Appellant at 33-34, FTC v. Texaco, Inc., 517 F.2d 137 (D.C. Cir. 1975), *rev'd en banc,* FTC v. Texaco, Inc., 555 F.2d 862 (D.C. Cir.), *cert. denied,* 431 U.S. 974 (1977).

59. The FTC has separate rules for adjudicative and nonadjudicative proceedings. *See* 16 C.F.R. § 2.1 (1977) (initiation of nonadjudicative investigations); *id.* § 2.7 (nonadjudicative subpoenas); *id.* § 3.11 (initiation of adjudicative proceedings); *id.* § 3.34 (subpoena power). The FMC also distinguishes between formal adjudicative procedures, 46 C.F.R. §§ 502.61-.170 (1976), and nonadjudicative procedure, *id.* §§ 502.281-.291, with parallel subpoena rules. *See id.* § 502.131 (formal adjudicative subpoena for FMC); *id.* § 502.286 (nonadjudicative compulsory process for FMC).

staff and excluded from adjudicative proceedings.[60] Such an "exclusionary rule" would reduce the agency's incentive to subvert collateral estoppel by issuing a nonadjudicative subpoena.

Law-tied considerations[61] have been urged as barriers to collateral estoppel in administrative law.[62] These considerations are, first, that estoppel rules may be relaxed when applied to favored agencies whose work demonstrates special social importance,[63] and, second, that the language or legislative history of an agency's enabling statute might protect the agency from estoppel based on another agency's adjudications.[64]

60. In United States v. Litton Indus., Inc., 462 F.2d 14 (9th Cir. 1972), the court was faced with simultaneous proceedings brought by the FTC. In one proceeding, the FTC was engaged in a nonadjudicative investigation into the behavior of conglomerates. In the other, the FTC was bringing an adjudicative divestiture action against Litton. Litton objected that the FTC was seeking to obtain information via a "nonadjudicative subpoena" to use in the divestiture action. The court held that if the FTC did use the "investigative documents" against Litton, it would constitute a violation of the defendants' due process rights. The warning notwithstanding, the court then enforced the subpoenas. 462 F.2d at 17-18.

Confronted with similar circumstances, the District of Columbia Circuit took prophylactic measures to prevent such a transfer in FTC v. Atlantic Richfield Co., 567 F.2d 96 (D.C. Cir. 1977). The FTC was conducting a study of the natural gas industry at the request of Congress. Atlantic was a party both to the investigative proceeding and an adjudicative proceeding alleging violations of antitrust laws. The court ordered that the documents obtained by the investigation should be withheld from the FTC officials supervising the adjudicative proceeding. 567 F.2d at 107.

61. Procedural rules are law-tied when controlled by substantive law. Law-tied rules can generate tensions between the policies of the rules themselves and the policies of the substantive law for which the procedural scheme must adjust. For example, rules regarding dispute resolution, rights of access to alternative forums, and arbitration could serve the national labor policy of fostering industrial peace. Predictability for both sides to collective bargaining agreements is served by committing the union and its members to arbitration for dispute resolution. But in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), a plaintiff was granted an additional right of action in federal court for a claim that had earlier been submitted to arbitration, because the claim alleged racial discrimination. Although this decision served the ends of Title VII, the goals of the National Labor Relations Act were not served. When the procedural rule scheme adjusts for differences in substantive claims or laws, the policies underlying the procedural rule scheme are similarly "adjusted." *See also* Western Addition Community Organization v. NLRB (Emporium Capwell, Inc.), 485 F.2d 917 (D.C. Cir. 1973), *rev'd*, 420 U.S. 50 (1975); NLRB v. Mansion House Center Management Corp., 473 F.2d 471 (8th Cir. 1973). *See generally* Meltzer, *The National Labor Relations Act and Racial Discrimination: The More Remedies, the Better?*, 42 U. CHI. L. REV. 1, 2-3 (1974) (critical of *Gardner-Denver* line of cases as threat to goals of NLRA procedural framework).

62. *See* Groner & Sternstein, *Res Judicata in Federal Administrative Law*, 39 IOWA L. REV. 300, 312 (1954) (criticizing United States v. Willard Tablet Co., 141 F.2d 141 (7th Cir. 1944), for enforcing estoppel against enforcement of Food, Drug and Cosmetic Act of 1938, 21 U.S.C. § 301 (1970), which deserves favored treatment); Kleinfeld & Goding, *Res Judicata and Two Coordinate Federal Agencies*, 95 U. PA. L. REV. 388, 392 (1947) (suggesting narrow application of res judicata to Food and Drug Administration and FTC proceedings because these agencies clearly serve the public welfare).

63. *See* note 62 *supra*.

64. *See* North Carolina v. Chas. Pfizer & Co., 537 F.2d 67 (4th Cir.), *cert. denied*, 429 U.S. 870 (1976) (prior FTC adjudication not binding in part because successful defense to action brought under § 5, Federal Trade Commission Act of 1914, 15 U.S.C. § 45 (1970), was not intended to confer immunity from Sherman Act prosecutions).

It has been argued that application of collateral estoppel should depend on "the ultimate policies involved" in a given case.[65] For example, in order to protect the public interest in healthful food and drugs, the FDA should not be bound by other agency adjudications.[66] Such general policy considerations neglect the interests present in a subpoena estoppel defense. The public's interest in providing administrative agencies with the means to respond to urgent developments does not require general consideration of an agency's worthiness.[67] Moreover, to allow a preferred agency a second opportunity to discover and litigate an issue that has already been decided invites conflict with the findings of another competent tribunal and would discourage agency cooperation. Finally, deciding whether an agency's purpose justifies judicial deference to the agency's subpoenas could foster a substantial amount of litigation in its own right, thus defeating a primary goal of collateral estoppel.[68]

Alternatively, the second law-tied consideration—a specific congressional directive that addressed the collateral estoppel question for a particular agency—would not encourage unnecessary litigation. When Congress bars estoppel of an agency's adjudications on the basis of the findings of another administrative body, courts must enforce that agency's subpoenas despite the resulting costs. Yet such provisions are rare.[69]

65. *See* Groner & Sternstein, *supra* note 62, at 312.

66. *Id.* An analogous argument is made in Mitchell v. NBC, 553 F.2d 265 (2d Cir. 1977). The plaintiff had unsuccessfully presented a racial discrimination claim before a state agency, the New York State Commission on Human Rights, and the state appellate division affirmed the agency ruling. The plaintiff then entered federal court and argued that her civil rights had been violated and that damages should be awarded pursuant to 42 U.S.C. § 1981 (1970). The district court held that the state administrative decision was res judicata. Mitchell v. NBC, 418 F. Supp. 462 (S.D.N.Y. 1976). The Second Circuit affirmed the district court's judgment. 553 F.2d at 265. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), *discussed at* note 61 *supra,* was distinguished because in that case the agency judgment was not affirmed by a court before reaching federal court. In his dissent, Judge Feinberg read *Gardner-Denver* more broadly and argued that a civil rights plaintiff was entitled to parallel and overlapping remedies. Judge Feinberg concluded that racial discrimination claims are important enough to warrant duplication. *Id.* at 277-80.

67. Collateral estoppel rules would not tie the hands of the agencies in such circumstances. A change in material circumstances would defeat the required identity of issues and unbind the agency from the prior adjudication. *See* Commissioner v. Sunnen, 333 U.S. 591, 598-602 (1948); 1B MOORE'S FEDERAL PRACTICE ¶¶ 0.415, 0.448 (2d ed. 1974).

68. This last problem would not even be mitigated by the operation of stare decisis. The consideration due an agency with a wide jurisdiction would vary with the subject matter of the subpoena in a given case. Once the question of the character or subject matter of the investigation is opened, the opportunities for litigation would be unrestricted by past cases. The party and agency would argue the merits of the investigation to decide whether the merits should even be reached.

69. Of the two such provisions that have surfaced in the case law, one works to weaken collateral estoppel claims, the other acts to strengthen these claims. Both have been applied where parties sought to bind adversaries in judicial proceedings to previous

Another obstacle to an effective subpoena estoppel policy is raised by judicial treatment of collateral estoppel on issues of law. Because law changes, courts have hesitated to enforce collateral estoppel on issues of law in any context.[70] To condition the results of one proceeding on those of another still subject to reversal or reinterpretation might lead to uneven or unstable judgments.[71] Accordingly, courts may refuse to recognize a collateral estoppel defense to a subpoena investigating a previously decided mixed issue of fact and law.[72]

Whatever its merits in other contexts, the reluctance to bind parties to findings of law is not an appropriate policy when a private party defends against an administrative subpoena.[73] Efficient and thorough agency law enforcement does not require limiting subpoena estoppel to pure issues of fact. A private party pleading estoppel on the basis of a previous agency adjudication is seeking to enforce repose, that is, to avoid a lengthy trial. If the initial administrative adjudication of the issue of law is later reversed, the subpoena can then be enforced without waste of administrative resources. Further, agency coopera-

administrative adjudications. *See* North Carolina v. Chas. Pfizer & Co., 537 F.2d 67 (4th Cir.), *cert. denied*, 429 U.S. 870 (1976) (*see* note 64 *supra*); Painters Dist. Council No. 38 v. Edgewood Contracting Co., 416 F.2d 1081 (5th Cir. 1969) (plaintiffs claiming damages for unfair labor practices in civil suit under NLRA § 303, 29 U.S.C. § 187 (1970), can rely on favorable ruling under NLRA § 8, 29 U.S.C. § 158 (1970)); United Eng'rs & Constructors, Inc. v. International Bhd. of Teamsters, 363 F. Supp. 845 (D.N.J. 1973) (same).

70. *See* United States v. Moser, 266 U.S. 236, 242 (1924); Shell Oil Co. v. Texas Gas Transmission Corp., 176 So. 2d 692 (La. Ct. of App. 1965); F. JAMES & G. HAZARD, *supra* note 19, at § 11.20; RESTATEMENT OF JUDGMENTS § 70 (1942); RESTATEMENT (SECOND) OF JUDGMENTS § 68.1(b) (Tent. Draft No. 4, 1977). *But see* Hadge v. Second Fed. Sav. & Loan Ass'n, 409 F.2d 1254 (1st Cir. 1969); Florasynth Laboratories, Inc. v. Goldberg, 191 F.2d 877 (7th Cir. 1951).

71. Because the decision on appeal would redefine the final judgment, those cases or proceedings that relied on or were bound by the reversed decision might have to be reopened or otherwise modified. *See* 1B MOORE'S FEDERAL PRACTICE ¶ 0.416[2] (2d ed. 1974); RESTATEMENT (SECOND) OF JUDGMENTS § 41.3 (Tent. Draft No. 1, 1973).

72. The defendants in *FTC v. Texaco* made a point of characterizing the issues on which they sought estoppel as issues of *fact*. Joint Memorandum of Respondents in Opposition to FTC Petitions for Enforcement at 50, FTC v. Texaco, Inc., No. 1089-73 (D.D.C., March 22, 1974), *rev'd en banc*, 555 F.2d 862 (D.C. Cir.), *cert. denied*, 431 U.S. 974 (1977). Even this strategy was not without risk, however, because courts have been reluctant to interrupt the administrative process where issues of "fact" are involved. *See* Borden, Inc. v. FTC, 495 F.2d 785 (7th Cir. 1974) (exhaustion of remedies principle demands that agency be permitted to proceed with development of issues of fact). But exhaustion of remedies, like the primary jurisdiction principle, should have limited application when the party seeking to interrupt the administrative process has already submitted to discovery and adjudication of the same issues by an administrative agency. *See* pp. 1257-58 & notes 49-52 *supra*.

73. The law/fact distinction makes more sense when considering "offensive" collateral estoppel (*i.e.*, when collateral estoppel is used to prove a claim), because in those cases a finding of law in another forum could serve as the basis for an entire cause of action. When estoppel is used defensively, as in a subpoena defense, the law/fact distinction is not relevant.

tion is not fostered by allowing agencies to relitigate and rediscover mixed issues of fact and law, and, inevitably, the task of distinguishing pure issues of fact from mixed issues of fact and law is likely to generate additional litigation.[74]

III. Toward a Functional Analysis

The collateral estoppel subpoena defense should be responsive to the goals of finality and thorough agency law enforcement. A private party should be relieved of the cost of answering a subpoena without denying an administrative agency its "day in court." Additionally, estoppel policy for administrative subpoenas should foster agency cooperation where possible. Because collateral estoppel requires a full hearing on the issue in question before estoppel is enforced, analysis of an estoppel defense should focus on the extent of adversariness in the initial proceeding and on overlap of issues.

A. *Adversariness*

In *Texaco* both Judge Leventhal and Judge Wilkey initiated their analyses of the subpoena estoppel defense by considering the adequacy of the prior proceeding.[75] Estoppel of an administrative subpoena cannot be enforced without proof of a prior proceeding that was procedurally adequate to provide the party being estopped with a full opportunity to litigate the contested issue. A court thus should first review the adversariness of the prior proceeding, as did Judge Leventhal and Judge Wilkey in *Texaco*.

The review for adversariness should ensure that the party to be estopped had adequate access to the earlier factfinding and lawfinding. The Administrative Procedure Act[76] defines formal agency adjudication in terms of both procedural guarantees[77] and specific

74. The categories tend to merge. *See* FTC v. Motion Picture Advertising Serv. Co., 344 U.S. 392 (1953) (majority found defendant's acts were unfair method of competition (matter of fact) but dissent characterized issue as scope of prohibition of unfair methods of competition (matter of law)); Note, *Res Judicata: Exclusive Federal Jurisdiction and The Effect of Prior State-Court Determinations*, 53 VA. L. REV. 1360, 1368-69 (1967) (enumerating practical difficulties of distinguishing between findings of fact and findings of law).

75. *See* notes 11 & 56 *supra*.

76. 5 U.S.C. §§ 551-559 (1970).

77. 5 U.S.C. § 554 (1970). These rights include the right to be accompanied by counsel, APA § 9, 5 U.S.C. § 555(b) (1970), to present evidence, APA § 5, 5 U.S.C. § 554(c) (1970), and to cross-examine witnesses. *See generally* International Bhd. of Elec. Workers v. International Wire, 357 F. Supp. 1018 (N.D. Ohio 1972), *aff'd*, 475 F.2d 1078 (6th Cir.), *cert. denied*, 414 U.S. 867 (1973).

characteristics of the decisionmaking process[78] that offer the parties the same access to the decisionmaking process as they receive in a court. An agency proceeding consistent with the APA's model of formal adjudication would satisfy the requirement of adversariness for a successful estoppel defense.

Administrative agencies employ many procedures, however, not all of which contain the full panoply of procedural guarantees.[79] This need not in itself impede judicial application of collateral estoppel. Even if the first proceeding did not meet APA standards for formal adjudication, the second investigating agency should be bound by the earlier determination unless the second agency grants the party significantly greater procedural rights than the party enjoyed in the first proceeding.[80] The agency seeking to avoid estoppel should not be able to disown the first agency's judgment unless the second agency's proceedings offer the private party a greater opportunity to litigate his claim.[81]

Attention to adversariness would assure consistent results only when consistency is desirable—after a hearing that was at least as adequate as that which would follow. The value of finality for the private party —avoiding costly discovery—would be served, but not at the expense of enforcement of the law; if the second proceeding afforded substantially greater opportunities to develop an issue, collateral estoppel would not interfere.

If the question of adversariness is unclear and the court is not convinced that the adversariness requirement has been satisfied, the court should examine the circumstances surrounding the parties' actions in

78. *Compare* APA § 5, 5 U.S.C. § 554 (1970) (adjudication) *with* APA § 4, 5 U.S.C. § 553 (1970) (rulemaking). The adjudicative decision is characterized by a judgment on the merits, on the record, without consultation with authorities not subject to cross-examination.

79. *See* Schopflocher, *The Doctrine of* Res Judicata *in Administrative Law,* 1942 WIS. L. REV. 5, 37-41 (argues against categorical labeling of adjudicative versus nonadjudicative procedure).

80. If the first proceeding had all of the elements of adversariness outlined by the APA, there could be no basis for a second proceeding, so long as the overlap-of-issues requirement was satisfied.

81. RESTATEMENT (SECOND) OF JUDGMENTS § 68.1(c) (Tent. Draft No. 4, 1977) ("A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts . . . ."); RESTATEMENT (SECOND) OF JUDGMENTS § 88.2 (Tent. Draft No. 2, 1975) (gives consideration to whether party against whom preclusion is asserted has procedural opportunities unavailable in first proceeding). Since we rely on certain dispute-resolution procedures to discover a just result, the interest in finality should prevail over the prospect of a second proceeding that offers no additional procedural guarantees. *See generally* Note, *Filling the Void: Judicial Power and Jurisdictional Attacks on Judgments,* 87 YALE L.J. 164, 184-88 (1977).

the first proceeding,[82] such as the parties' incentive to litigate and the agency's opportunity to intervene.[83] A court also could examine how fully a particular issue was litigated to inform its judgment of the adequacy of the first proceeding.[84] In a given action, either the agency or the private party litigant might lack incentives to contest vigorously an issue formally raised in the proceedings and concluded in the judgment. In related contexts, courts have been reluctant to enforce estoppel when a particular issue was not carefully considered in the first proceeding because one or both of the parties lacked the incentive to litigate.[85]

Similarly, a court could inquire whether the agency against which estoppel is asserted had the opportunity to protect its interests in the first proceeding.[86] Although intervention in the first proceeding by that agency is not always necessary for granting estoppel,[87] encouraging such agency cooperation by penalizing nonintervention would help ensure that the issues will be fully litigated in future proceedings. Thus, a court entertaining an estoppel defense to a subpoena might consider whether the second agency had reason to know that its interests were at stake in the first proceeding and had the opportunity to intervene in the proceeding.[88]

82. The court should first use the APA criteria of adversariness as a guide to measure whether the second proceeding will offer the party pleading estoppel a significantly greater opportunity to develop his defense. *See* note 77 *supra.*

83. These criteria are subsidiary because although they serve the goals of estoppel policy, they turn on relatively complex issues of fact and so would generate litigation. As such, they do not contribute to all of estoppel policy's goals.

84. Just as a court in a negligence action would hesitate to give estoppel effect to a previous conviction for a traffic violation, a court entertaining an estoppel claim must consider the incentives on both sides to litigate in the first proceeding. *See* Thornburg v. Perleberg, 158 N.W.2d 188 (N.D. 1968) (error even to admit evidence of traffic conviction); Haynes v. Rollins, 434 P.2d 234 (Okla. 1967) (same); Loughner v. Schmelzer, 412 Pa. 283, 218 A.2d 768 (1966) (same).

85. *See* A. Duda & Sons Coop. Ass'n v. United States, 495 F.2d 193, 197-98 (5th Cir. 1974) (considering claim that prior judgment should not have binding effect since it might have been conceded by one party for tactical purposes); Safir v. Gibson, 432 F.2d 137, 145 (2d Cir.), *cert. denied,* 400 U.S. 850 (1970) (reviewing whether private party had sufficient incentive to defend issue in prior proceeding that did not involve possible financial liability).

86. For example, in the *Texaco* case the FTC investigation began before the FPC hearings on the reserve estimates issue were concluded. *See* note 11 *supra.*

87. Because one agency is bound to the adjudications of another by the privity doctrine, intervention is not necessary. *See* pp. 1251-52 & notes 26-29 *supra.*

88. *See* Aerojet Gen. Corp. v. Askew, 511 F.2d 710 (5th Cir.), *cert. denied,* 423 U.S. 908 (1975) (since state neglected chance to join agency proceeding, judgment adverse to agency was binding in subsequent suit); Southwest Airlines Co. v. Texas Int'l Airlines, 396 F. Supp. 678, 684 (N.D. Tex. 1975) (defendants forbidden to relitigate claim in state court, although not parties to first judgment, because they were aware that their interests were included in first proceeding). *See generally* F. JAMES & G. HAZARD, *supra*

B. *Overlap of Issues*

To serve the goals of subpoena policy, analysis of the adversariness of the first proceeding must be combined with analysis of the issues decided. Collateral estoppel traditionally requires an identity of issues between the subject of the first judgment and the focus of estoppel in the second proceeding.[89] Although this element ensures that parties are estopped only on issues determined in previous proceedings, the standard of *literal* identity obstructs effective collateral estoppel policy.[90]

Rather than require a literal identity of issues, courts should look for a functional overlap between issues litigated and issues investigated in the subpoena in question. Even though the prior judgment or finding applied a legal standard or rule different from that involved in the second investigation,[91] a court should ask whether the

note 19, at § 11.31; RESTATEMENT (SECOND) OF JUDGMENTS § 111.2 (Tent. Draft No. 4, 1977); RESTATEMENT (SECOND) OF JUDGMENTS § 88.3 (Tent. Draft No. 2, 1975); Note, *The Expanding Scope of the* Res Judicata *Bar*, 54 TEX. L. REV. 527 (1976) (critical of *Aerojet*).

89. *See* 1B MOORE'S FEDERAL PRACTICE ¶ 0.443[1] (2d ed. 1974).

90. The requirement of identity of issues can be taken quite literally. Courts have rejected a finding of identity of issues simply because different statutes were involved in the second proceeding, without further analysis of the possibility that common factual issues (or mixed issues of fact and law, *see* note 72 *supra)* were in fact involved in the proceedings. If issues are identical, a different underlying purpose for the second agency's existence does not require relitigation. *See* note 52 *supra*. Nevertheless, the identity of issues requirement has been treated as requiring an identity of underlying legislative purpose. *See* Brandenfels v. Day, 316 F.2d 375 (D.C. Cir. 1963) (court refused to bind FTC to Post Office adjudication, because agencies act under different statutes, though court did not consider whether Post Office proceedings had reached issues FTC would pursue); Brief for Appellant at 30, FTC v. Texaco, Inc., 517 F.2d 137 (D.C. Cir. 1975), *rev'd en banc*, 555 F.2d 862 (D.C. Cir.), *cert. denied*, 431 U.S. 974 (1977) ("The Federal Trade Commission's law-enforcement responsibilities are plainly different from that of the Federal Power Commission. . . . The presence of different statutes mean[s] . . . a different legislative purpose and results in the absence of an identity of issues which is required for *res judicata* or collateral estoppel.")

Although not an administrative proceeding, Brubaker v. King, 505 F.2d 534 (7th Cir. 1974), suggests the lengths to which courts will pursue a literal identity of issues. The plaintiff sought to bring a damage action for wrongful arrest pursuant to 42 U.S.C. § 1983 (1970). The state court in the previous criminal proceeding determined that the arresting officer had probable cause to arrest the defendant. In the civil suit in federal court, the defendant officer sought to apply the state court finding collaterally to estop the plaintiff's claim. The Seventh Circuit held that because the probable cause test is different for civil damage actions than for criminal proceedings, estoppel was inappropriate. This ruling seems counter-intuitive, however, because the requirement for probable cause is far easier for the civil defendant to meet than for the state in a criminal prosecution. *See* Brubaker v. King, 505 F.2d at 537 (in tort action against government agent, defendant need show only reasonable good faith belief of probable cause).

91. Courts have enforced estoppel on the basis of a judgment tied to a statute different from the one that underlay the second proceeding. Section 5 of the Federal Trade Commission Act makes illegal "unfair or deceptive acts or practices," 15 U.S.C. § 45 (1970). The Food, Drug and Cosmetic Act (FDCA) prohibits labeling that is "false and misleading in any particular." FDCA § 502, 21 U.S.C. § 352 (1970). In United States v. Willard Tablet Co., 141 F.2d 141 (7th Cir. 1944), a prosecution under the FDCA was

subject of the present inquiry was necessarily decided in the former judgment.[92]

In *Safir v. Gibson*[93] the court looked beyond the holding of the first proceeding to find a functional overlap between the issues concluded in the Federal Maritime Commission (FMC) proceeding and the issues presented in the Federal Maritime Association (FMA) proceedings that were to follow.[94] In the initial proceeding, certain defendants were found in violation of a statute prohibiting unreasonably low rates. Based on this finding, a plaintiff later sued those defendants and claimed to be an object of unjust discrimination prohibited by another statute.[95] Since this plaintiff was the injured person who had participated in the initial proceeding, the court found that the issue in question in the second proceeding had been decided in the first notwithstanding the different statutes involved.

The functional overlap requirement serves the goals of an effective subpoena estoppel policy. The interest in finality requires that private parties be forced to endure costly investigations of the same issue only once, regardless of the statute underlying the investigation. Moreover, since the different administrative agencies enforce many different laws, the goal of encouraging inter-agency cooperation requires a flexible overlap-of-issues standard that looks beyond the names of the statutes to the issues involved in the proceedings.

estopped by a previous FTC adjudication. In George H. Lee v. FTC, 113 F.2d 583 (8th Cir. 1940), the FTC was deemed to be bound by a previous adjudication under the Foods and Drugs Act, a predecessor of the FDCA. *See also* Safir v. Gibson, 432 F.2d 137 (2d Cir.), *cert. denied*, 400 U.S. 850 (1970).

92. Judicial collateral estoppel has already developed along the recommended lines when applying criminal convictions to civil proceedings. Most courts no longer require a literal identity of issues, and instead accept a functional overlap between the issues concluded in the criminal judgment and those contested in the second action. In Travelers Indem. Ins. Co. v. Walburn, 378 F. Supp. 860 (D.D.C. 1974), a criminal conviction for second degree murder, which required a finding of malice, estopped the civil defendant from denying that he acted with knowledge that he would cause harm. In the civil action, this finding acted to suspend the defendant's insurance coverage. In Teitelbaum Furs, Inc. v. Dominion Ins. Co., 58 Cal. 2d 601, 375 P.2d 439, 25 Cal. Rptr. 559 (1962) (en banc) a plaintiff in a civil action was estopped from denying that the alleged theft for which he sought recovery was a fraudulent claim. The plaintiff was in privity with the company president who had been convicted for conspiracy to commit grand theft. Although in each case the previous criminal conviction overcame a different burden of proof, the court in each recognized that in fact the standard was more favorable to the defendant in the criminal case, and estoppel in the civil case was appropriate. *But see* Brubaker v. King, 505 F.2d 534 (7th Cir. 1974), *discussed at* note 90 *supra*.

93. 432 F.2d 137 (2d Cir.), *cert. denied*, 400 U.S. 850 (1970).

94. *See* note 17 *supra*.

95. Although the FMC did not make a specific finding on the unjust discrimination issue, the court examined the Commission's docket, as well as the judgment. The court held that the FMC found the rates to be unreasonably low because they were "admittedly unreasonable and noncompensatory and were justified only in furtherance of the unfair attempt to drive . . . [the plaintiffs] from the trade." 432 F.2d at 141.

The goal of thorough agency law enforcement also requires consideration of the role of a given subpoena in an investigation. Subpoena estoppel should not deny the administrative agency the chance to frame issues for further inquiry outside the scope of the original adjudication.[96] Thus the court should consider the agency's ability to frame alternative issues without access to the subpoenaed materials. A court could expect an agency with access either to private documents through earlier rounds of discovery[97] or to other available sources of information[98] to avoid subjects of previous adjudications more easily than if the agency were just beginning an investigation.[99] If an agency has access to such documents or information, the court should be less ready to provide the agency with documents relevant only to an issue already adjudicated. But if an agency is beginning an investigation without access to most relevant material, the court should be more tolerant of overlap.

A consideration of the agency's alternative avenues of inquiry would further the goals of estoppel by encouraging agencies to use available documents efficiently. Furthermore, consideration of the particular investigation's history would recognize the burdens imposed by numerous or broad subpoenas but would allow agencies with no prior access to any documents to tread closer to previously concluded issues.

IV. A Rule for Applying Collateral Estoppel to Administrative Subpoenas

The considerations of adversariness and overlap of issues suggested above for analyzing a collateral estoppel defense to an administrative subpoena can be formulated as a practical rule:

> An administrative subpoena that requests documents or other materials relevant only to an issue concluded in a prior administrative proceeding shall not be enforced by a federal court.[100]

96. *See* p. 1254 & note 37 *supra*.

97. For example, in the *Texaco* case, the American Gas Association, a trade association composed of natural gas producers and distributors, complied voluntarily with the FTC inquiry into gas reserve estimates.

98. Data might be available to the agency in the public record.

99. A strong prejudice exists in the case law against considering private party costs, because courts are reluctant to allow financial considerations to dilute the principle of agency expertise. *See* Borden, Inc. v. FTC, 495 F.2d 785, 789 (7th Cir. 1974).

100. The test for collateral estoppel could also be applied by the agency itself. Following an objection to a subpoena by a private party, the agency or Administrative Law Judge (ALJ) would be in a position to apply the suggested analysis. *Cf. In re* Exxon Corp., 86 F.T.C. 585, [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,990 (1975) (*see* note 32 *supra*) (FTC affirms ALJ decision refusing to give collateral estoppel or res judicata effect to previous Justice Department antitrust suits against oil companies defending in present FTC adjudication). But the final responsibility for enforcement in the event of noncompliance would involve a federal court.

A. For the purposes of this rule, *a prior administrative proceeding that concludes an issue* is defined as a proceeding in which:

(1) both the administrative agency and the private party were given a full and fair opportunity to litigate the issue, and

(2) there was a judgment on the merits of the issue(s) that overlaps with the issue(s) currently under investigation.

B. The court may consider the following factors in deciding whether the adversariness requirement contained in *A*(1) is satisfied:

(1) the parties' incentive to litigate the issue in question in the first proceeding, and

(2) the investigating agency's opportunity to intervene in the first proceeding.

C. The court shall consider the following factors when the overlap requirement contained in *A*(2) is satisfied:

(1) whether the number and scope of the subpoenas that the private party has answered in the course of the instant investigation provided the agency with the means to frame alternative issues for inquiry, and

(2) whether other sources of information are available to the agency for the purpose of framing alternative issues.

V. Two Hypothetical Cases

The proposed rule will be applied to two hypothetical cases, which present different permutations of the *Texaco* fact pattern.

1. Suppose that the Federal Power Commission (FPC) initiated an investigation into the gas reserve estimates of the natural gas producers in the course of a ratemaking proceeding. The ratemaking proceeding began in 1965, the reserve estimates hearings began in 1968, and the Administrative Law Judge's decision on the reserve estimates was issued in 1972. The Administrative Law Judge decided that the reserve estimates were "accurate for the purposes of ratemaking."

In 1970 the Federal Trade Commission began an investigation into the accuracy of the gas reserve estimates, pursuant to the FTC's responsibility to discover and prevent fraudulent business practices. The FTC issued subpoenas to the gas producers; one round of discovery ended in 1970, the second began in 1972. Although the gas producers complied with the first set of subpoenas, they refused to comply with the second set and asserted that the 1972 FPC judgment collaterally estopped the 1972 FTC subpoena. The FTC answered that the FPC decision could not serve as an appropriate base for an estoppel defense because the FPC was engaged in a ratemaking proceeding, and

since ratemaking is a quasi-legislative function, findings in a ratemaking proceeding cannot be res judicata.[101]

Analysis can begin with the overlap-of-issues requirement. If the reserve estimates are accurate, they cannot be fraudulent. The question is whether "accuracy for ratemaking purposes" meets the standard of accuracy required to defend against a fraudulent business practice claim. To the extent that this is the case, the required overlap (but not identity) of issues is present.[102]

The second requirement for estoppel focuses on the nature of the first proceeding. Although that proceeding was nominally a ratemaking proceeding, the proposed rule requires an evaluation of the procedures employed to determine the issue in question. The hearings before the ALJ were specifically addressed to the reserve estimates question. Although the issue was decided pursuant to a ratemaking proceeding, the tests for adversariness would be met if the hearing before the ALJ provided both sides with at least as many procedural rights as the proceeding that would follow the 1972 FTC subpoenas. Assuming that this is the case, the FPC judgment is an appropriate base for estoppel.

Any doubts on the adversariness question can be resolved by referring to the incentives to litigate and the FTC's opportunity to intervene in the earlier proceeding. The ratemaking proceeding centered on the reserve estimates hearings; the FPC's attempt to procure a basis for lower rates for natural gas focused on the theory of underreporting of reserves. The unsuccessful party (FPC) had every incentive to litigate the issue. Further, the FTC had ample opportunity to intervene, since the two investigations took place concurrently.[103] Because adversariness and overlap of issues are satisfied, collateral estoppel should be enforced against the FTC.

2. Suppose instead that the FTC initiated an investigation in 1970 into the accuracy of the gas reserve estimates. The FTC investigation was avowedly adjudicative,[104] and the FTC hearings followed the APA model of formal adjudication. In deciding that the gas producers had not violated section 5 of the Federal Trade Commission Act,[105] the FTC found the yearly reserve estimates for 1970-1975 to be accurate.

101. *See* note 9 *supra.*

102. In his *Texaco* dissent, Judge Wilkey argued that these standards were equivalent. FTC v. Texaco, Inc., 555 F.2d 862, 932-33 (D.C. Cir.) (en banc), *cert. denied,* 431 U.S. 974 (1977) (dissenting opinion).

103. For FPC rules on intervention, see note 39 *supra.*

104. The FTC has different rules for adjudicative investigations. *See* note 59 *supra.*

105. 15 U.S.C. § 45 (1970).

In 1976 the Securities and Exchange Commission (SEC) began an investigation of officers and directors of the gas producers. The SEC alleged that these insiders had failed to disclose pertinent information in their possession when they purchased company stock in 1973, in violation of SEC Rule 10b-5.[106] The SEC suspected that the gas producers had misled investors by delaying public disclosure of discovered gas reserves.[107] When the SEC issued subpoenas to the gas producers for their reserve estimates, the gas producers defended on grounds of collateral estoppel. The producers argued that the issue of the accuracy of the reserve estimates was closed by the FTC adjudication. The defendants further argued that since the reported reserves were accurate, the public could not have been misled, and the purchases by insiders did not violate Rule 10b-5.

The requirement of adversariness is clearly satisfied since the FTC proceedings meet the APA standards for formal adjudication. Even though the SEC could not intervene in the FTC proceedings because of the timing of the investigations, the criterion of adversariness is satisfied by the procedural guarantees of the first proceeding.

The overlap-of-issues requirement, however, is not satisfied. Although the FTC did address reserve estimates, the SEC's theory of a Rule 10b-5 violation acknowledges the possibility that year-end reserves in 1973 were accurate. Conceivably, the gas producers could have misled investors by delaying the disclosure of new gas discoveries without rendering inaccurate the year-end reported reserve estimates. Although the FTC addressed the question of intra-year reporting techniques, the focus of the investigation was on year-end estimates. An alternative formulation of this problem is that the FTC did not actively litigate the issue of intra-year reserve estimates, but instead concentrated on year-end reserves. Any doubt on the question of overlap of issues is dispelled because this is the SEC's first subpoena in the investigation, and the SEC simply does not have other means for pursuing the case. If the SEC had access to documents relevant to intra-year reporting techniques, the FTC judgment could be a ground for estoppel of the SEC subpoenas. But given the SEC's position, the subpoenas should be enforced.

106. 17 C.F.R. § 240.10b-5 (1977).

107. A somewhat similar set of facts is found in SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301 (2d Cir.), *cert. denied*, 404 U.S. 1005 (1971).